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NO. 89-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LIVELY EXPLORATION COMPANY, ET AL.,
Appellants

v.

VALERO TRANSMISSION COMPANY,
Appellee

On Appeal From The Court of Appeals For The Fourth Supreme Judicial District of Texas

APPELLANTS' RESPONSE TO MOTION TO DISMISS APPEAL AND, ALTERNATIVELY, TO AFFIRM JUDGMENT

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TABLE OF CONTENTS

		Page
I.	This Appeal Is Within This Court's Jurisdiction Under 28 U.S.C. § 1257	1
II.	Appellants Timely Raised The Federal Question On Which It Appeals To This Court	6
III.	Appellants Have Raised A Substantial Federal Question	8
IV.	Conclusion	10

SUPPLEMENTAL APPENDIX

	Public Law 100-352 [S. 952]; June 27, 1988	1a
	Lone Star Gas Company, et al. v. The Railroad Commission of Texas, et al., No. 3-88-012-CV, Court of Appeals, Third District of Texas, at Austin	7a
	Letter dated 12-20-89 from Supreme Court of the United States, Office of the Clerk, to Jesse P. Luton, Jr.	25a
	Letter dated 1-8-90 from Supreme Court of the United States, Office of the Clerk, to Jesse P. Luton, Jr.	26a

LIST OF AUTHORITIES

CASES

	Page
Andrews v. Virginian Railway Co., 248 U.S. 272 (1919) ...	3, 4
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) ...	7
Chicago Great Western Railroad Co. v. Basham, 249 U.S. 164 (1919) ...	3, 4
Clark v. Jeter, 486 U.S. 456 (1988) ...	8
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) ...	10
Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) ...	7
Herndon v. State of Georgia, 295 U.S. 441 (1935) ...	8
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) ...	5
Longever v. Miller, 124 Tex. 80, 76 S.W.2d 1025 (1934) ..	9
Maryland v. Garrison, 480 U.S. 79 (1987) ...	9
Michigan v. Long, 463 U.S. 1032 (1983) ...	8, 9
Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930) ...	7
United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958) ...	4
United States v. Indrelunas, 411 U.S. 216 (1973) ...	4
United States v. Vest, 639 F.Supp. 899 (D. Mass. 1986), *aff'd* 813 F.2d 477 (1st Cir. 1987) ...	5
Wessely Energy Corp. v. Jennings, 736 S.W.2d 624 (Tex. 1987) ...	9

UNITED STATES STATUTES

Act of September 6, 1916, § 7, 39 Stat. 726 (1916) ...	3, 4
Pub.L. No. 100-352, § 7, 102 Stat. 662 (1988) ...	2, 3, 5, 6
15 U.S.C. § 3432(a), Natural Gas Policy Act of 1978	10
28 U.S.C. § 1257 ...	1, 2, 5, 6

FEDERAL RULES OF CIVIL PROCEDURE

Rule 58 ...	4, 5, 6

TEXTS

Carey, *In Favor of Uniformity*, 3 F.R.D. 507 (1943) ...	4
47 Tex. Jur. 3d *Judgments* § 4 at 503 (1986) ...	4
Wright & Miller, Federal Practice and Procedure: Civil 2d § 1002 at 8, § 1008 at 47, § 2782 at 10 (1987) ...	4

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v.

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On Appeal From The Court of Appeals For The Fourth Supreme Judicial District of Texas

APPELLANTS' RESPONSE TO MOTION TO DISMISS APPEAL AND, ALTERNATIVELY, TO AFFIRM JUDGMENT

To The Honorable United States Supreme Court:

Appellants[1] file this response to Appellee's Motion to Dismiss Appeal and, Alternatively, to Affirm Judgment ("Appellee's Motion to Dismiss Appeal").

I.

This Appeal Is Within This Court's Jurisdiction Under 28 U.S.C. § 1257

The amendment of 28 U.S.C. § 1257 ("Section 1257") does not affect Appellants' right to file this appeal or this

1. A complete list of parties is on page ii of Appellants' Jurisdictional Statement. Lively Exploration Company has no parent or subsidiary companies.

Court's jurisdiction over this appeal. Section 7 of Public Law 100-352 ("Section 7") states:

> The amendments made by this Act shall take effect ninety days after the date of the enactment of this Act, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was *entered* before such effective date.[2]

The amendment thus does not affect the right to appeal from a judgment "entered" before September 25, 1988.

The date the judgment appealed from became appealable to this Court is irrelevant to whether the new or the old version of Section 1257 applies. Appellee relies on a quotation from legislative history (Appellee's Motion to Dismiss Appeal, p. 6). The use of the phrase "subject to appeal" in the House Report merely indicates that the law governing timing of appeal applies only to judgments which are appealable. It does not indicate that the date a judgment becomes appealable controls whether a judgment comes within the exception in the amendment. The phrase "that have been *issued* prior to the effective date of this act" states clearly that the relevant date is not the date the judgment becomes subject to appeal, but instead the date of *issuance,* or entry, of the judgment.

Since Appellee does not, and could not, dispute that (1) the judgment of the Texas Court of Appeals ("Court of Appeals"), and not the judgment of the Texas Supreme Court, is the judgment appealed from (Appellee's Motion to Dismiss Appeal, p. 3) and (2) the judgment of the

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2. Review of Cases By the Supreme Court, Pub.L. No. 100-352, § 7, 102 Stat. 662 (1988). The full text of Public Law 100-352 appears on pages 1a - 6a of the Supplemental Appendix. Emphasis is added throughout except where otherwise indicated.

Court of Appeals was entered on March 31, 1988, and modified May 18, 1988, it necessarily follows that the amendment does not eliminate this Court's jurisdiction over this appeal.

The fact that "the time limit for applying for relief runs from the date the state Supreme Court refuses writ or rehearing, not from the date of the court of appeals decision" (Appellee's Motion to Dismiss Appeal, p. 4) does not mean that the date of the denial of writ or rehearing is determinative or even relevant to entry of judgment under Section 7. Under Section 7 the controlling date is the date the judgment appealed from is *"entered,"* not the date the 90-day docketing period begins to run.

This Court should not be guided by *Chicago Great Western Railroad Co. v. Basham,* 249 U.S. 164 (1919), or *Andrews v. Virginian Railway Co.,* 248 U.S. 272 (1919). Both of these cases involved interpretation of the 1916 amendment to the Judicial Code, Act of September 6, 1916, § 7, 39 Stat. 726 (1916). The 1916 amendment, which also referred to entry of a judgment, and *Chicago Great Western* and *Andrews,* which held that entry of judgment is synonymous with finality of judgment, were drafted in an era twenty years prior to the adoption of the Federal Rules of Civil Procedure. The 1938 adoption of the Federal Rules of Civil Procedure was a watershed event that revolutionized procedure in federal court, led to equally sweeping changes in state procedure, and created universally held notions of entry of judgment which are completely at odds with the view of *Chicago Great Western* and *Andrews* that a judgment is not entered until state remedies have been exhausted. In light of the adoption of the Federal Rules of Civil Procedure and the fact that courts and lawyers since 1938 have universally considered entry of judgment as being a purely ministerial

act of the court clerk, *Chicago Great Western* and *Andrews* should be viewed only as interpretations shortly after the turn of the century that do not reflect contemporary meaning of "entry" of judgment.[3]

Prior to the adoption of Rule 58 of the Federal Rules of Civil Procedure, "[p]ractice under the former [Equity] [R]ule was quite unsatisfactory. A number of matters regarding the entry of judgment were not clearly resolved by the rule and differing views were taken in the lower courts." *Wright & Miller, supra* n.3, § 2782 at 10. The adoption of Rule 58 resolved the uncertainty and ambiguity surrounding the term "entry of judgment" and introduced a standard definition of the term.[4] Rule 58 "requires two distinct acts to coincide before there is an effective judgment. Every judgment must be 'set forth on a separate document' and must be entered in the docket as provided in Rule 79(a)." *Id.*, § 2781 at 8.

Entry of judgment occurs when the two acts described in Rule 58 occur, not when state appellate remedies are exhausted. Entry of judgment is the ministerial act of the clerk of entering on court records the judgment rendered by the Court.[5] A judgment was entered by the Court of Appeals on March 31, 1988, even though that judgment was not final with respect to jurisdiction of this Court and state appellate remedies were not yet exhausted.

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3. *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 1002 at 8 (1987), § 1008 at 47; Carey, *In Favor of Uniformity*, 3 F.R.D. 507 (1943).

4. Rule 58 was completely rewritten in 1963 to further eliminate uncertainty as to the meaning of the term. Wright & Miller, *supra* n. 3, § 2781 at 8.

5. *United States v. Indrelunas*, 411 U.S. 216, 219-21 (1973); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-36 (1958). In Texas, "[e]ntry of a judgment is the act by which evidence of the judicial act [of rendering judgment] is afforded." 47 Tex. Jur. 3d *Judgments* § 4 at 503 (1986).

The March 31, 1988, judgment (Appendix, p. 37) concludes: "*Entered* this 31st day of March, 1988." No other judgment was entered after March 31, 1988. Thus, the judgment appealed from was "entered" on March 31, 1988, even if it did not become a final judgment for purposes of appeal to this Court until the Texas Supreme Court denied Appellant's application for writ of error on June 7, 1989.

Section 7 does not refer to the entry of *final* judgment or entry of an order making a judgment of the lower court *final*. Instead, Section 7 excepts from the amendment any judgment or decree that was "*entered*" before September 25, 1988. This Court must interpret Section 7 in light of the contemporary universal meaning of entry of judgment and *in pari materia* with Rule 58. *See United States v. Vest*, 639 F.Supp. 899, 909 (D. Mass. 1986), *aff'd* 813 F.2d 477 (1st Cir. 1987). Under Rule 58 and the universally accepted meaning of entry of judgment, judgment was entered on March 31, 1988.

Appellants' decision to file a jurisdictional statement, and not a petition for writ of certiorari, was a studied one. After careful examination of the amended version of Section 1257, counsel for Appellants concluded that the judgment appealed from was the judgment of the Court of Appeals, in reliance on *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968), and that the date on which that judgment was entered was March 31, 1988, in light of (1) Rule 58, (2) the universally understood meaning of entry of judgment, and (3) the fact that the March 31, 1988, judgment explicitly states that judgment was entered on that date, Appendix, p. 37. Since the amended version of Section 1257 does not refer to the entry of *final* judgment or entry of an order making a judgment *final*, no reasonable lawyer could possibly

predict that the amended version of Section 1257 could have the meaning urged by Appellee. Such an interpretation is at odds with the contemporary and universally understood meaning of the word "entered" that appears in the amended version of Section 1257 and with the Clerk of the Supreme Court's interpretation of Section 7. Supplemental Appendix, p. 26a.

Alternatively, should the Court read Section 7 as vitiating Appellants' right to appeal and the Court's jurisdiction over this appeal, it should treat Appellants' Jurisdictional Statement as a petition for writ of certiorari. This would be consistent with the regular practice of the Clerk of the Supreme Court. Supplemental Appendix, p. 25a. Appellants should not lose their right to have their filing considered as a petition for writ of certiorari by virtue of their good faith reliance on the commonly accepted meaning of "entered" and Rule 58 of the Federal Rules of Civil Procedure.

II.

Appellants Timely Raised The Federal Question On Which It Appeals To This Court

Appellee argues that points of error Nos. 23 and 24 "could have been raised before the motion for rehearing." (Appellee's Motion to Dismiss Appeal, p. 17). Points of error Nos. 23 and 24 could not have been properly raised prior to the motion for rehearing since the opinion of the Court of Appeals, and not any action of the trial court, raised the federal question. Prior to the opinion of the Court of Appeals, all Texas courts passing on the question rejected a Gas Market Demand Rule ("the Rule") defense to a take-or-pay claim based on the Rule. *See* Appendix, pp. 90-96. In addition, the history of the Rule was clear that the Rule does not apply to relieve Appellee

of its obligations under the "take-or-pay" provision of the natural gas contract. *See* Appendix, pp. 87-90. Thus, the federal question was timely presented, since the Court of Appeals' holding was a surprise that could not be reasonably anticipated from any prior decision.

Unless the Court of Appeals' decision had a basis in precedent and thus could be reasonably anticipated, Appellants had no responsibility to raise hypothetical points of error based on every possible novel application of the Rule by the Court of Appeals. The essence of this Court's holding in all of the cases cited on page 5 of the Jurisdictional Statement is that a litigant is not responsible for (1) anticipating that the appellate court will uphold the departure of the trial court from settled law and all of the various reinterpretations of the law that the appellate court *might* issue in the course of upholding the court's action or (2) marshalling hypothetical constitutional challenges to all of those various reinterpretations.

In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1932), the Court held that the rule that a constitutional question first raised on a motion for rehearing is untimely does not apply where the grounds of the decision appealed from supply a new and unexpected basis for a claim of denial of a federal right. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930), the Court held that a federal question is timely raised in a petition for rehearing where it arises from a construction placed upon a statute that is at variance with prior law. In neither of these cases, nor in *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), did the Court dismiss the appeal simply because other points of error had been raised earlier that related to the point of error raised in the motion for rehearing.

In *Herndon v. State of Georgia*, 295 U.S. 441, 445 (1935), relied upon by Appellee (Appellee's Motion to Dismiss Appeal, p. 18), the Court held that the appellant should have been aware of a similar ruling in another case and anticipated the possibility that similar ruling would be followed. No such ruling existed here, and all precedent and the history of the Rule indicated that the Rule's meaning with respect to contract rights was a settled question.

Unlike *Clark v. Jeter*, 486 U.S. 456 (1988), which is cited on page 19 of Appellee's Motion to Dismiss Appeal, Appellants did adequately present the preemption and commerce clause argument to the Court of Appeals on motion for rehearing, Appendix, p. 57, and to the Texas Supreme Court, Appendix, pp. 77-78, 129. *See* Jurisdictional Statement, pp. 4-6.

III.

Appellants Have Raised A Substantial Federal Question

Appellee argues that "independent state law grounds (the other Contract provisions interpreted in accordance with state law) support the Court of Appeals' judgment." (Appellee's Motion to Dismiss Appeal, p. 21). This is untrue. Article XIII, ¶ 13.1, of the Contract and the Rule were essential to the Court of Appeals' interpretation of the Contract. This Court's test for independent state grounds announced in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), requires that "the state court decisions indicate clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." No such indication appears in the Court of Appeals' opinion. The mere fact that the opinion sets out provisions of the Contract does not suggest that the court believed that those provisions serve as separate, adequate, and

independent grounds. Moreover, the decision does not "indicate *clearly* and *expressly* that it is alternatively based on" grounds other than the Rule. Since it appears that the ground for the Court of Appeals' decision is interwoven with and dependent upon the federal question presented by Appellants, no basis exists for Appellee's argument that independent state law grounds support the Court of Appeals' judgment.[6] In addition, the Court of Appeals' holding that the "rule was relevant and material to prove or disprove that there was a breach of the 'take-or-pay' provision" (751 S.W.2d at 652, Appendix, p. 4) was based on an interpretation of the Rule and not an interpretation of the Contract, since even if the Contract had not included a government regulation clause all laws and regulations would become a part of the Contract and govern the transaction. *Wessely Energy Corp. v. Jennings,* 736 S.W.2d 624 (Tex. 1987); *Longever v. Miller,* 124 Tex. 80, 76 S.W.2d 1025 (1934).

Appellee argues that "no federal question would be presented even were Lively's interpretation of the court of appeals opinion correct." (Appellee's Motion to Dismiss Appeal, p. 21). However, Appellee's analysis of the cases cited by Appellants on preemption and the commerce clause is wrong. *See* Jurisdictional Statement, pp. 11-29. Additional authority for Appellants' position on preemption and commerce clause violation was provided by the December 13, 1989, opinion of the Austin Court of Appeals in *Lone Star Gas Co. v. Railroad Commission of Texas,* Supplemental Appendix, pp. 7a-23a. The court there invalidated portions of the Rule on preemption grounds and suggested (footnote 4) that the remainder of

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6. *Maryland v. Garrison,* 480 U.S. 79, 84 n. 7 (1987) ("[T]he 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . .' "] (quoting *Michigan v. Long,* 463 U.S. 1032, 1040 (1983)).

the Rule may also be invalid. *Lone Star's* conclusion that the Rule is invalid *per se* adds considerable weight to Appellants' argument that this case deserves the Court's attention. *See* Jurisdictional Statement, pp. 12-13.

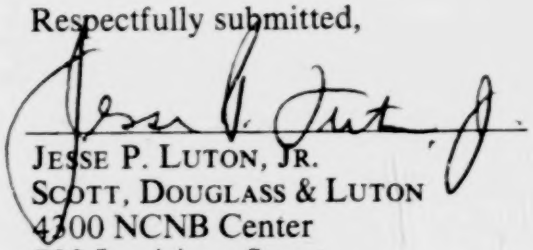
Appellee argues that this appeal presents no federal question, since the contract at issue is an intrastate gas sales contract. (Appellee's Motion to Dismiss Appeal, pp. 21-22). This point is addressed in the Jurisdictional Statement, pp. 25-26. In addition, *Lone Star* invalidated portions of the Rule as they apply to an intrastate pipeline system, Supplemental Appendix, p. 12a. The case cited by Appellee, *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), is inapplicable because the specific statute there involved was specifically sanctioned by § 602(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3432(a). *Id.* at 187.

IV.

Conclusion

For these reasons and the reasons in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX

PUBLIC LAW 100-352 [S. 952]; June 27, 1988

REVIEW OF CASES BY THE SUPREME COURT

An Act to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Section 1252 of title 28, United States Code, and the item relating to that section in the section analysis of chapter 81 of such title, are repealed.

Review of Decisions Invalidating State Statutes

Sec. 2. (a) Section 1254 of title 28, United States Code, is amended by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

(b) The section heading for section 1254 of such title is amended by striking out "appeal;".

(c) The item relating to section 1254 in the section analysis of chapter 81 of title 28, United States Code, is amended by striking out "appeal;".

Review of State Court Decisions Involving Validity of Statutes

Sec. 3. Section 1257 of title 28, United States Code, is amended to read as follows:

"§ 1257. State courts; certiorari

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

"(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.".

Review of Decisions from Supreme Court of Puerto Rico

Sec. 4. Section 1258 of title 28, United States Code, is amended to read as follows:

"§ 1258. Supreme Court of Puerto Rico; certiorari

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties

or statutes of, or any commission held or authority exercised under, the United States.".

Conforming Amendments

Sec. 5. (a) The items relating to sections 1257 and 1258 in the section analysis of chapter 81 of title 28, United States Code, are amended to read as follows:

"1257. State courts; certiorari

"1258. Supreme Court of Puerto Rico; certiorari.".

(b) Section 2101(a) of title 28, United States Code, is amended by striking out "sections 1252, 1253 and 2282" and inserting in lieu thereof "section 1253".

(c) Section 2103 of title 28, United States Code, and the item relating to such section in the table of sections for chapter 133 of such title are repealed.

(d)(1) Section 2104 of title 28, United States Code, is amended to read as follows:

"§ 2104. Reviews of State court decisions

"A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.".

(2) The item relating to section 2104 in the section analysis of chapter 133 of title 28, United States Code, is amended to read as follows:

"2104. Reviews of State court decisions.".

(e) Section 2350(b) of title 28, United States Code, is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

Amendments to Other Laws

Sec. 6. (a) Section 310 of the Federal Election Campaign Act of 1971 (2 U.S.C. 437h) is amended by repealing subsection (b), and by striking out "(a)" before "The Commission".

(b) Section 2 of the Act of May 18, 1928 (25 U.S.C. 652), is amended by striking out ", with the right of either party to appeal to the United States Court of Appeals for the Federal Circuit".

(c) The last sentence of section 203(d) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is amended to read as follows: "An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.".

(d) Section 209(e)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(e)(3)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(e) Section 303(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743(d)) is amended to read as follows:

"(d) Review.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for a writ of certiorari to the Supreme

Court of the United States. Such review is exclusive and any such petition shall be filed in the Supreme Court not more than 20 days after entry of such finding or determination.".

(f) Section 1152(b) of the Omnibus Budget Reconciliation Act of 1981 (45 U.S.C. 1105(b)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(g) Section 206 of the International Claims Settlement Act of 1949 (22 U.S.C. 1631e) is amended by striking out "sections 1252, 1254, 1291, and 1292" and inserting in lieu thereof "chapter 83".

(h) Section 12(a) of the Act of May 13, 1954, commonly known as the Saint Lawrence Seaway Act (33 U.S.C. 988(a)), is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

(i) Section 25(a)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136w(a)(4)) is amended by—

(1) repealing clause (ii) of subparagraph (E); and

(2) striking out the following:

"(E) Judicial Review.—

"(i) Any", and inserting in lieu thereof the following:

"(E) Judicial Review.—Any".

Effective Date

Sec. 7. The amendments made by this Act shall take effect ninety days after the date of the enactment of this Act, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date.

Approved June 27, 1988.

IN THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AT AUSTIN

ON REMAND

No. 3-88-012-CV

LONE STAR GAS COMPANY, ET AL.,
Appellants

v.

THE RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
299TH JUDICIAL DISTRICT NO. 414,537,
HONORABLE JOE B. DIBRELL,
JUDGE PRESIDING

Appellants filed suit in the district court of Travis County pursuant to the Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-37.011 (1986 & Supp. 1989) and the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 12 (Supp. 1989) (APTRA), seeking a declaration as to the validity and applicability of certain rules promulgated by the Texas Railroad Commission. After a trial on the merits, the district court rendered judgment that the Commission did not exceed its authority by enacting the rules, but dismissed the cause for lack of ripeness.

The trial court was called upon to declare (1) whether the rules in question were valid and (2) their applicability to certain described fact situations. By its judgment, the trial court purported to find that the rules were valid, but then proceeded to order a dismissal as to the entire cause on the basis that the request for declaratory relief applying the rules was premature. The two issues, although they might have been, were not severed; instead, the matter was before us for review on a judgment of dismissal. As our Supreme Court has noted many times, "[i]t is elementary that a dismissal is in no way an adjudication of the rights of parties; it merely places the parties in the position that they were in before the court's jurisdiction was invoked just as if suit had never been brought." Crofts v. Eighth Court of Appeals, 362 S.W.2d 101, 104 (Tex. 1962).

In an unpublished opinion, we held that the court erred in dismissing the instant cause, because the matter was ripe and the trial court was duty-bound to decide all the issues properly before it. *See* Bellegie v. Texas Board of Nurse Examiners, 685 S.W.2d 431, 434 (Tex. App. 1985, no writ). We reversed the judgment of dismissal and remanded the matter to the trial court for further proceedings and rendition of a final declaration of all matters in issue. Because a dismissal does not operate as an adjudication, we held that the attempt to decide one issue was of no legal effect in light of dismissal of the entire cause, and we thus declined to render what we believed to be an advisory opinion on a matter not properly before this Court.

The Supreme Court, however, reversed our decision and remanded the cause to this Court. 767 S.W.2d 709 (Tex. 1989). Although the Supreme Court recognized

that the trial court had dismissed the case below, we were directed to ignore what it termed an "inconsistency" and instructed that we were obliged to render an opinion on whether the rules were valid despite the posture of the case. We question whether doing so complies with or violates Tex. R. App. P. Ann. 81(c) and 90(a) (Supp. 1989). Nevertheless, in reviewing the matter, we will sustain appellants' challenge to the rules and reverse the judgment of the trial court.

Appellants requested a ruling as to the validity of certain of the Commission's "ratable take" and "proration" rules governing the natural gas industry. *See* Tex. R.R. Comm'n Rules, 12 Tex. Reg. 536 (1988) (to be codified at 16 Tex. Admin. Code §§ 3.30(a)(1),(5) and 3.34 (h)(2-4) (since amended)). These rules were promulgated in response to the creation of special marketing programs (SMPs). SMPs are affiliates of larger companies that are able to buy gas in circumvention of established contracts and Commission policies that would be applicable to the larger companies.

Section 30(a)(1) defines a "first purchaser" as "the first purchaser of natural gas produced from a well," but adds "[a] first purchaser and any affiliate of the purchaser that transports any natural gas it purchases from a well by use of the same pipeline system used by the first purchaser of which it is an affiliate shall be treated as a single first purchaser for purposes of ratability requirements," unless the affiliate is a special marketing program under section 3.34(h).

Section 30(a)(5) defines an affiliate as a "person or entity that owns, is owned by, or is under common ownership with another person or entity to the extent of 50%

or more or that otherwise controls or is controlled by another person or entity," adding "affiliates of a common entity are also affiliates of each other," and listing certain exceptions.

Section 34(h) sets out the scheme for qualifying an affiliate as a separate first purchaser by designating the affiliate as a SMP. The section requires:

> (2) Each and every special marketing program offer to purchase gas must be made without discrimination within a field and without unjust or unreasonable discrimination between fields to all operators for all wells on the pipeline system of the affiliated first purchaser from which that affiliated first purchaser has been purchasing and accepting delivery of gas as a first purchaser. The offer must also be made for all first, second and third priority category gas on the affiliated first purchaser's pipeline system which it has been purchasing and accepting for delivery under an obligation to purchase and accept delivery from the tailgate of a plant processing gas to extract liquids, or from a gathering system that purchases from wells and is required by contract or by its physical connections to sell its gas entirely to the affiliated first purchaser, whether or not those purchases were made as a first purchaser.
>
> (3) It is unreasonably discriminatory, and therefore prohibited, for the offer to purchase gas in the special marketing program, or from any release of gas for sale in the special marketing program to require release of any claims under any existing contract other than a release of the gas for sale in the special marketing program or a requirement of a volume-for-volume basis for gas taken in the special marketing program to be credited against any existing contract, if the credit provision is limited to the period of actual participation in the special marketing pro-

gram. Nothing in this paragraph shall prohibit an operator of any well from offering terms inconsistent with these provisions. The making of an offer which is not accepted shall not affect rights under existing contracts.

(4) If the well producing priority category 1, 2 or 3 gas is shut in or curtailed, and waste is found by the Commission to exist, neither a special marketing program purchaser nor its affiliated first purchaser may purchase lower priority category gas until all the priority category 1, 2 and 3 gas is taken and resulting waste is prevented. The Commission shall expedite determination of waste, and may enter an emergency, temporary or interim order upon affidavit proof that waste is occurring.[1]

The trial court judgment states "the Commission did not exceed its lawful authority in enacting, adopting, and implementing the rules under attack herein."

Appellants complain that the district court erred in declaring the challenged rules valid because: (1) the rules are beyond the Commission's statutory authority; (2) the rules are inconsistent with the statutes; (3) the statutes provide no guidelines or standards governing the Commission's jurisdiction in this subject matter, resulting in an unconstitutional delegation of legislative power; (4) the rules are contrary to the public policy of Texas

1. The Commission amended Rule 34(h)(3) so that it prohibits an offer to a producer to participate in a special marketing program to "require modification of any existing contract provisions," except a volume-for-volume credit against the particular contract from which gas is released for sale to the SMP. 12 Tex. Reg. 4325 (Nov. 20, 1987); 134 Tex. Reg. 838 (Feb. 12, 1988). The Commission amended Rule 34(h)(4) so that a waste complaint must be accompanied by supporting documentation and a statement that all documents filed have been served on the first purchaser and any affiliated SMP. 12 Tex. Reg. 2860-2861 (Aug. 25, 1987).

and the United States and are preempted by federal statute; and (5) the rules deprive appellant of state and federal constitutional rights to due process and equal protection of the laws. We will dispose of the state law grounds before reaching appellants' federal constitutional claims. *See* Hagans v. Lavine, 415 U.S. 528, 547 (1974); Southern Nat'l Bk. of Houston v. City of Austin, 582 S.W.2d 229, 235 (Tex. Civ. App. 1979, writ ref'd n.r.e.).

Appellant Lone Star is both an intrastate and an interstate pipeline company. It seeks a declaration as to the applicability of the rules to its intrastate pipeline system. Appellant Enserch Gas Company (Enserch) is a gas marketing company that utilizes the Lone Star pipeline system to make deliveries to its customers. Both are wholly-owned by Enserch Corporation. Enserch Gas purcases gas from the spot market, i.e., gas that is not dedicated to long-term gas contracts and is available for immediate sale. The spot market price of gas is much lower than the long-term contract price. Enserch often purchases gas from operators who have long-term contracts with Lone Star. Just as often, however, it purchases from operators with whom Lone Star has had no relationship. Moreover, Enserch often has conditioned its purchases from these operators upon their crediting the Enserch purchase against the amount Lone Star is obligated to take from the operator. Lone Star and Enserch both sell gas to local gas utilities.

First, appellants complain that the challenged rules are beyond the Commission's statutory authority. The Commission has been granted broad discretion in administering the laws regarding natural gas regulation. Burford v. Sun Oil Co., 319 U.S. 315 (1943). We are obligated

to hold that the rules are valid if constitutional, within the power granted to the Commission, and promulgated pursuant to the proper procedure. Helle v. Hightower, 735 S.W.2d 650, 654 (Tex. App. 1987, writ denied). We presume the rules are valid, particularly where they have been adopted following notice and public hearing. Trapp v. Shell Oil Co., 198 S.W.2d 424 (Tex. 1946); *see also* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 756 (Tex. 1982); Texas Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41, 43 (Tex. 1970).

The Commission's statutory authority is derived from legislative delegations of authority codified in the Texas Natural Resources Code. Texas Nat. Res. Code Ann. § 86.041 (1978) states:

> The Commission has broad discretion in administering the provisions of this chapter and may adopt any rule or order in the manner provided by law that it finds necessary to effectuate the provisions and purposes of this chapter.

For example, the Commission may proscribe practices it determines to be wasteful, even if those practices are not statutorily proscribed. *Shell Oil,* 206 S.W.2d at 241. Indeed, the Commission has an affirmative duty to prevent waste and conserve gas. Railroad Comm'n v. Rowan Oil Co., 259 S.W.2d 173, 176 (Tex. 1953). The Commission states in its preamble to the rules that they are adopted pursuant to the Commission's general rulemaking authority granted in section 81.052; section 85.202, relating to the conservation of oil and gas and prevention of waste of oil and gas; section 86.041, further authority for prevention of waste and conservation of gas; and sections 111.083, 111.090, and 111.133 (the Common Purchaser

Act), relating to purchases and takes by common purchasers without discrimination or the use of monopolistic practices.

The Commission promulgated the challenged rules to protect priority schemes concerning nominations, purchases, and the production of gas following the advent of SMPs. These schemes in turn assure that casinghead gas, oil, and special allowable wells continue producing. The rules enhance the Commission's ability to regulate waste, promote conservation, protect correlative rights, prevent discrimination, and encourage production by purchasers and their SMP affiliates. The rules are in harmony with the general objectives of the act involved. *See* Gerst v. Oak Cliff Savings and Loan Association, 432 S.W.2d 702, 706 (Tex. 1968); Jefco, Inc. v. Lewis, 520 S.W.2d 915, 921 (Tex. Civ. App. 1975, writ ref'd n.r.e.). The Commission may refuse to consider affiliates as separate first purchasers in order to promote its protective scheme.

Second, appellants complain that the challenged rules are inconsistent with the statutes cited by the Commission as authority to promulgate the rules. We hold that the questioned rules are consistent with statutes aimed at preventing waste, protecting correlative rights, and preventing discrimination. The Commission's long-established rules and policies were designed and implemented to achieve those goals, and the Commission has demonstrated that without the challenged rules the protective scheme to effectuate those goals will be circumvented. Appellants vigorously complain that the rules cannot be valid because there has been no evidentiary hearing in which the Commission found Lone Star to have encouraged waste or to have discriminated in purchasing gas.

It is well-settled that because the Commission is charged with supervising gas production, it has the "power to devise some reasonably definite plan or pattern to start with." Gulf Land Co. v. Atlantic Richfield Co., 131 S.W. 2d 73, 80 (Tex. 1939). Because the rules provide a procedure to obtain variances, the rules are not beyond the Commission's power to promulgate. *Gulf Land Co.*, 131 S.W.2d at 80. We note further that the Commission is specifically permitted to act by rule. *See* Tex. Nat. Res. Code Ann. §§ 81.052, 85.201, 85.202(b), 86.041, 86.042, 111.090, and 111.133 (Supp. 1989). The questioned rules are consistent with statutes relied upon by the Commission.

Third, appellants complain that the statutes upon which the Commission relies for rulemaking authority in this instance contain no standards for the exercise of such authority. Specifically, appellants complain that the statutes do not define "affiliate," indicate that affiliated first purchasers may be treated as single first purchasers, or "define the concept of discrimination as encompassing the content of contractual negotiations."

The delegation doctrine requires that the statute relied upon by a regulatory agency set forth the policy of the state as adopted by the legislature and establish the primary standards to which the government and the public must adhere. Southwestern Savings & Loan Assoc. v. Faulkner, 331 S.W.2d 917, 921 (Tex. 1960). This standard may be broad where conditions that cannot be conveniently investigated by the legislature must be considered. Corzelius v. Harrell, 186 S.W.2d 961, 964 (Tex. 1945); Housing Authority of the City of Dallas v. Higgingbotham, 143 S.W.2d 79, 87 (Tex. 1940). The agency

may adopt rules within the parameters of the general policy defined by the legislature. Brown v. Humble Oil & Refining Co., 83 S.W.2d 935, 940 (Tex. 1935).

The legislature's failure to address specific unforeseen circumstances in the statutes that delegate authority to the Commission does not render the statutes invalid for "want of standards." To require that legislation address each possible exercise of agency power would defeat the purpose of delegating legislative authority. *See Corzelius*, 186 S.W.2d at 964. The standards here are found in the statutes directing the Commission to prevent waste, promote conservation, and protect correlative rights. The Commission has exercised its constitutionally delegated authority in implementing the challenged rules.

Fourth, appellants complain that the challenged rules contravene state and federal public policies and are preempted by federal law. Appellants reason that any regulatory action having the direct or indirect effect of increasing the prices appellants pay for gas is against public policy. While regulations causing unreasonably high price increases have been successfully challenged, price is only one factor to be considered in evaluating whether a statute promotes public policy. Appellants offered no evidence that the challenged rules cause such unreasonably high price increases that the rules contravene public policy, and the Commission offered evidence that other public policy interests would be promoted by implementation of the challenged rules.

Appellants argue that the rules in question have been preempted by both the Natural Gas Act, 15 U.S.C.A. §§ 717-717z (West 1976 & Supp. 1989), and the Natural Gas Policy Act of 1978, 15 U.S.C.A. §§ 3301-3432

(West 1982 & Supp. 1989)[2]. It is clear that a finding of preemption is not favored, and it should not be made in the absence of persuasive reasons. Chicago & North Western Transp. v. Kalo Brick & Title Co., 450 U.S. 311, 317 (1981). Moreover, a presumption exists against finding preemption of state law in areas traditionally subject to state regulation. California v. ARC America Corp., 490 U.S. ____, ____ (1989). Nevertheless, we must reach such a conclusion in this instance.

Before the NGPA's passage, interstate natural gas transportation and sales were subject to the NGA. The NGA established an intricate price control system to regulate the transport and sale of gas in interstate commerce. "Interstate commerce" is defined in the NGA as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States." 15 U.S.C.A. § 717a(7). It thus established a comprehensive scheme to govern all interstate gas transactions. Northern Natural Gas Co. v. State Corp. Comm'n of Kansas, 372 U.S. 84, 91 (1963). The NGA did not apply to "the production or gathering of natural gas." 15 U.S.C.A. § 717(b). That function was reserved for the states. Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682, 690 (1947).

The United States Supreme Court has held that under the NGA, state regulation of purchasers is completely pre-

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2. Appellant's third point of error is divided into five subparts. Subpart (E), with which we are concerned, argues that the challenged rules are against the public policy of Texas, the public policy of the United States, and are preempted by federal law. The point is multifarious. Tex. R. App. P. Ann. 74(d) (Supp. 1989). Nevertheless, we are directed to determine whether the rules are valid. We will consider the point of error.

empted and, therefore, any such regulation is void. *Northern Natural,* 372 U.S. at 92. In *Northern Natural,* the Kansas Corporation Commission had promulgated regulations requiring interstate pipeline companies to purchase gas ratably from all wells connected to their pipeline system in each field within the state. The regulation implemented a Kansas statute that empowered the Commission to regulate gas production so as to prevent discrimination against gas producers and encourage gas conservation. The Supreme Court held that because the regulations were directed at gas purchasers subject to federal regulation, the fact that the regulations were intended to promote natural gas conservation was immaterial. *Northern Natural,* 372 U.S. at 92. The Court held that both direct price regulation and regulations affecting interstate gas prices were preempted and therefore void. *Northern Natural,* 372 U.S. at 91.

After the energy shortages of the 1970s, Congress perceived the need to permit market forces to affect natural gas prices. To this end, it passed the Natural Gas Policy Act of 1978. Transcontinental Pipe Line Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409, 420 (1986). The NGPA substantially reduced the level of federal gas regulation. However, rather than reflecting a wholesale retreat from the gas regulation field, the NGPA expands federal control in many respects because it delegates regulatory authority over intrastate transactions to the Federal Energy Regulatory Commission. *Transco,* 474 U.S. at 421. It also preserves the NGA pricing structure over "old" gas.[3] 15 U.S.C.A. § 3431. FERC is given the power to set the rates and prices by which most intra-

3. "Old gas," for the purpose of discerning whether the NGA is applicable, is that gas which was committed or dedicated to interstate commerce as of November 8, 1978. 15 U.S.C.A. § 3431(a)(1)(A).

state transactions take place. 15 U.S.C.A. § 3371(a)(2) and (b)(2). This section is implemented by FERC at 18 C.F.R. §§ 284.1 - 284.305 (1989).

The Supreme Court has consistently held that under the NGPA, state attempts to regulate gas prices by regulating natural gas purchasers are preempted by federal law. Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. ____, ____ (1989); Schneidewind v. ANR Pipeline Co., 485 U.S. ____, ____ (1988); *Transco*, 474 U.S. at 423. States may continue to regulate production in a manner that incidentally affects purchasers' costs. *Northwest Pipeline*, 489 U.S. at ____; *Schneidewind*, 485 U.S. at ____. However, the NGPA preempts such production regulations if the regulations have an impact on matters within federal control and are not an incident of efforts to achieve a "proper state purpose." *Northwest Pipeline*, 489 U.S. at ____.

The *Transco* Court applied three factors to decide whether the challenged state natural gas regulations were preempted. These are (1) whether the regulation comes within the limits of the comprehensive federal regulatory scheme; (2) whether the state regulation conflicts with the federal interest, expressed by both Acts, in protecting gas consumers by ensuring low gas prices; and (3) whether the regulation is directed at purchasers. *Transco*, 474 U.S. at 420, 423. Thus, in *Transco*, Mississippi's regulation requiring gas purchasers to take gas ratably and without discrimination from all producers in a gas pool was held to be preempted. In *Schneidewind*, the Court held that Michigan's attempt to require an interstate pipeline to obtain approval of its Public Service Commission before issuing long-term securities was preempted because the clear object of the statute was to regulate gas rates.

Schneidewind, 485 U.S. at ____. In *Northwest Pipeline*, however, the challenged Kansas regulation that cancelled producers' production allowables where the actual production was far below the allowable was upheld on the grounds that Kansas was regulating producers and that the regulation had negligible price effects. *Northwest Pipeline*, 489 U.S. at ____.

Appellees argue that the regulations are designed to prevent waste, promote conservation, and protect correlative rights. These are proper state purposes. Where a state regulates producers to attain these goals, the incidental effect on purchasing decisions does not generally result in a finding of preemption. *Northwest Pipeline*, 489 U.S. at ____. However, as noted above, federally-regulated purchasers may not be made the subject of state regulation. Lone Star and Enserch are federally-regulated purchasers because each is an intrastate pipeline that sells to both interstate pipelines and to local distribution companies served by interstate pipelines. 15 U.S.C.A. § 3371(b)(2)(A)(i) and (ii).

Appellees further argue that because production and sales are part of an "integrated system," the state validly may take measures to affect a pipeline's capacity in order to prevent waste by producers. Thus, claim appellees, although the challenged rules strictly regulate how SMPs and their affiliates purchase surplus gas, the rules affect production and are therefore within the sphere of permissible state regulation. *See* 12 Tex. Reg. 536-37. This argument fails for several reasons. First, it concedes that purchasers are regulated. Second, even though the challenged regulations may regulate producers, the regulations also create higher gas prices in the spot markets in which

SMPs operate.[4] They therefore constitute an improper state purpose under *Northwest Pipeline* and come within

4. In determining that the Railroad Commission intended to maintain increased spot market prices, we have looked to several sources. First, trial testimony establishes the fact. Former Commissioner Clark Jobe testified that the regulations were adopted to address the problem of too much market leverage being exercised by purchasers. Moreover, we have looked to the statement accompanying the rule. *See* Beal, *The Scope of Judicial Review of Agency Rulemaking: The Interrelationship of Legislating and Rulemaking in Texas*, 29 Baylor L. Rev. 597, 677 (1987). The agency has stated, "[t]he sections are not intended to affect or influence the price of gas." They also state, however, "[i]t is the intent of the Commission that any offers resulting in curtailment or shutting in of gas . . . may be reviewed by the Commission to determine if the offers have resulted in waste." It also states, "[t]hat the section requires ratable production and purchases to be based on actual market demand." But the regulations make a quantity of gas demanded by a segment of purchasers unpurchasable. "Actual market demand" as stated here necessarily means the state-altered demand, which is another way of stating that purchases are to occur in a Texas-determined market structure. Finally, we have looked to other agency rules bearing on the same subject. *Beal, supra* at 677. We note that Commission Rules 30, 34, 64, 65, and 68 are the only Railroad Commission rules that regulate purchasers to any significant degree. Other than Rules 30 and 34, these rules plainly affect producers only to the extent necessary to control waste and encourage conservation. Other commission rules control the gas production side of the Texas natural gas market, *e.g.*, Rule 31 (gas well allowables) and Rules 101-104 (NGPA operator permit process). Rule 30, however, puts extensive burdens on first purchasers. They must nominate the quantity of gas to be taken from each operator, in order to permit the Commission to "determine demand and set allowables for ratable production not exceeding market demand." Rule 30(d). Moreover, first purchasers are obligated to nominate no more than "anticipated market demand for gas on the pipeline system of the initial nominator for the month for which the nomination is made." Rule 30(e). Purchasers must also strictly nominate for the purchases of the majority of their downstream purchasers. Rule 30(f) obligates purchasers to buy on terms that "ratably apportion without unjust or unreasonable discrimination" as between fields where they purchase gas. This type rule was held by the Supreme Court to be preempted. *Transco*, 474 U.S. 409. Through this rule, as well as Rule 34, we find the pricing component of the Commission's attempt to regulate the entire intrastate gas market (and to some extent the interstate

its second criterion. Third, they regulate matters within the federal purchasing regulatory scheme. Appellee's argument that the regulations are production-oriented only is therefore belied. The regulations fly squarely in the face of the criteria utilized by the Supreme Court in *Northwest Pipeline*.

Appellees argue that the challenged regulations do not restrict the amount of gas available to qualified separate first purchasers. As a result, they conclude, the regulations do not distort the market by restricting supply and, thus, increasing price. First, Rule 34(h)(2) requires that SMPs purchase gas without discrimination within or between fields where the operators are on the affiliate's pipeline system. The rule obligates SMPs to buy only from producers on its affiliated pipeline system. Second, under Rule 34(h)(4), SMPs may not purchase lower priority gas from category 1, 2, or 3 gas producers whom the Commission has found to have created waste unless and until the SMP's affiliate has taken all of the field's higher priority gas. Third, under Rule 34(h)(3), SMPs are not permitted to negotiate with producers for a volume-for-volume credit against its affiliate's take-or-pay obligations, although producers are permitted to offer such credit on their own. If the affiliate SMP entities are not able to qualify under Rule 34, they are subject to the Rule 30 first purchaser requirements. These restrictions constitute a prohibition against a significant amount of otherwise permissible natural gas purchases. We reject the contention that the regulations do not restrict the quantity of available gas supplied.

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gas market, *see* Rule 30(e)). Given the agency's statements, Commissioner Jobe's testimony, and the context of these rules in other supply-restricting rules, we see that its price necessarily will be high by restricting the quantity as gas supplied.

The challenged rules come within the limits of the comprehensive NGPA scheme, they conflict with the federal interest in low gas prices, and they seek to regulate purchasers covered by the NGPA. As a result, Rules 30(a)(1) and (5), and 34(h)(2), (3), and (4) are preempted by federal law. By virtue of clause 2, Article VI of the United States Constitution, we hold the rules are therefore invalid.[5] Appellant's third point of error is sustained to the extent that it complains the rules are preempted by federal law.

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5. Although the parties have failed to bring two cases to our attention, we wish to distinguish our decision from those reached by the First Court of Appeals in Gulftide Gas Corp. v. Cox, 699 S.W.2d 239 (Tex. App. 1985, writ ref'd n.r.e.) and this Court in Bullock v. Enserch Exploration, Inc., 614 S.W.2d 215 (Tex. Civ. App. 1981, writ ref'd n.r.e.), cert. denied, 455 U.S. 946 (1982). In *Gulftide*, a gas transmission company sued a gas producer for breach of contract, fraud, and breach of fiduciary duty in their gas purchase contract. The First Court of Appeals held that the federal regulatory scheme did not preempt the authority of state courts to determine the validity of gas purchase contracts. This holding does not conflict with our decision today. In *Gulftide*, the court relied upon federal authority for the proposition that state courts may determine the validity of contract escalations under state law. *See* Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360 (5th Cir. 1981). We do not doubt that a state court may determine if a gas purchase contract is a valid contract under principles of state law. Whether the negotiated transaction is void under state regulations is a different issue.

Also, in *Enserch Exploration, Inc.*, this Court held that a federally-regulated interstate gas pipeline is subject to state franchise taxes for that proportion of gas it sells for resale out of state. There, we stated, "[i]n setting up these regulations Congress clearly intended that the price of natural gas would reflect the reasonable costs of its production and transportation." 614 S.W.2d at 219. We held that one such cost was to pay for state services supplied to the industry. Thus, the tax was permissible. Here, however, purchasers are required to shoulder a burden that the unrestricted market would not impose, namely, the burden of foregoing a significant percentage of potential gas purchases. An unrestricted market would have created a cost burden for the services supplied to the industry that we considered in *Enserch*. To that extent, the tax in *Enserch* is not akin to the regulations we consider today.

Because of our disposition, it is unnecessary to address appellant's remaining arguments. The judgment of the trial court is reversed and judgment is rendered that the challenged rules are declared invalid.

Marilyn Aboussie, Justice

[Before Chief Justice Shannon, Justices Gammage and Aboussie]

Reversed and Rendered

Filed: December 13, 1989

[Publish]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 20, 1989

Mr. Jesse P. Luton, Jr.
700 Louisiana Street
4300 NCNB Center
Houston, TX 77002

Re: Lively Exploration Company, et al.,
v. Valero Transmission Company
No. 89-935

Dear Mr. Luton:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on December 7, 1989 as No. 89-935.

Forms are enclosed for notifying opposing counsel that the case was docketed. Also enclosed is a form for the entry of your appearance as counsel.

This case has been filed as a petition for writ of certiorari. This Court no longer has jurisdiction over appeals from state courts or U.S. Courts of Appeals whose judgments were rendered after 9/25/88. See P. L. 100-352.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

By: /s/ STEFANI F. McDIVITT
Stefani F. McDivitt
Assistant

Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 8, 1990

Mr. Jesse P. Luton, Jr., Esq.
700 Louisiana Street
4300 NCNB Center
Houston, Texas 77002

RE: LIVELY EXPLORATION COMPANY, et al. v.
VALERO TRANSMISSION COMPANY
No. 89-935

Dear Mr. Luton:

Thank you for informing me that I had incorrectly docketed your jurisdictional statement as a petition for writ of certiorari. I had overlooked the fact that the underlying judgment was issued before September 25, 1988.

This is to confirm that your jurisdictional statement is now docketed as an appeal, and that our records have been changed accordingly.

I apologize for the concern and confusion which my error has caused, and I appreciate your phone call.

Very truly yours,

JOSEPH F. SPANIOL, JR.,
CLERK

By

Stefani F. McDivitt
Assistant Clerk

cc: J. Clifford Gunter
Clerk, Court of Appeals of Texas
Fourth District (No. 04-87-00380-CV)